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84-0927

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

POLICY

STAT MEMORANDUM FOR [redacted] OFFICE OF LEGISLATIVE AFFAIRS, CENTRAL INTELLIGENCE AGENCY

SUBJECT: Letter to Senate Armed Services Committee on DoD Polygraph Proposal

[redacted] STAT

This is in regards to our conversation this morning regarding our appearance next Wednesday, March 7, before the Senate Armed Services Committee regarding our proposal to expand use of the polygraph. As you requested, I am attaching a "spread-sheet" which sets forth the essence of the proposal, a copy of our statement explaining it, and a proposed draft letter to go from the DCI to Senator Tower on this. Feel free, obviously, to modify it in any way you choose.

It would help considerably to have such a letter, and hopefully before the hearing itself. We would appreciate anything you might do.

L. Britt Snider
Principal Director for
Counterintelligence & Security Policy

Attachments
a/s

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Honorable John Tower
Chairman
Senate Armed Services Committee
Washington, D.C. 20510

Dear Mr. Chairman:

I understand the Armed Services Committee will consider the Department of Defense proposal to expand use of the polygraph at a hearing scheduled for March 7, 1984. The essential feature of the proposed expansion would permit the heads of Defense components to establish a limited, counterintelligence-scope polygraph examination as a condition of access to highly classified information protected within special access programs, created pursuant to Executive order 12356. These cover intelligence programs, as well as research and development, and operational activities of peculiar sensitivity.

I totally support the Defense proposal. As you know, I am charged by law and executive order with the protection of intelligence sources and methods. The polygraph has been conspicuously successful at both CIA and at NSA in developing information of security significance with respect to persons who will have access to intelligence sources and methods, but its use for this purpose elsewhere in the government has, for various reasons, not been sanctioned, notwithstanding the fact that these departments and agencies often have access to

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precisely the same information.

The Defense Department proposes a very limited expansion, both in terms of those affected by the requirement and in terms of the effects on particular individuals. Clearly, however, it will provide more security assurance than we currently have that our most sensitive intelligence programs, involving Defense personnel, are not penetrated by hostile intelligence agents.

I urge, therefore, the Committee to support this initiative, and permit Defense to proceed with its implementation.

With your permission, I ask that this letter be placed in the record of the hearing on this proposal.

Sincerely,

William Casey

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For delivery

STATEMENT OF

GENERAL RICHARD G. STILWELL, USA (RET.)

DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY

BEFORE

THE SUBCOMMITTEE ON CIVIL SERVICE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

U.S. HOUSE OF REPRESENTATIVES

REGARDING H.R. 4681

FEBRUARY 29, 1984

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Madame Chairwoman, I appreciate the opportunity on behalf of the Department of Defense to provide our views on the two major thrusts of H.R. 4681, to wit, use of the polygraph within the federal government and the institution of prepublication review requirements among federal employees. I shall first address the polygraph.

At the outset of my remarks, to preclude any possible misunderstanding, I want to emphasize that my testimony today regarding DoD's proposed use of the polygraph has no relationship to National Security Decision Directive 84. The proposed changes to DoD policy were developed a full year before NSDD 84 was issued, and have entirely different purposes: NSDD 84 provided that departments and agencies should amend their regulations to permit adverse actions against an employee who refused to take a polygraph examination in a "leak" investigation. The purpose of the DoD changes is to deter and detect espionage against our most sensitive programs. Thus, it is important for the subcommittee to understand that the proposed changes to Defense policy regarding the polygraph were not affected by the recent action of the President to suspend the implementation of the polygraph provisions of NSDD 84 within the executive branch.

Having clarified this, let me now turn to the bill before the subcommittee.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

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As we read the bill, Section 3 would prohibit use of the polygraph with regard to the civilian employees of the Department of Defense for any purpose other than a criminal investigation or an investigation of an unauthorized disclosure of classified information, except insofar as it may be used at the National Security Agency, which is exempted from the bill altogether.

If this reading is accurate, then enactment of this legislation would prevent the Department from utilizing the polygraph in ways it is currently being employed, as well as preclude its use in ways being contemplated for the future. To be more specific, the polygraph is currently used in DoD for several purposes not recognized by the bill: first, to resolve derogatory information developed in background investigations that cannot be resolved in any other way; second, to ensure that intelligence sources, acting on behalf of DoD intelligence components, are bona fide; third, for exculpatory purposes; and fourth, for counterintelligence investigations (where evidence of criminal conduct may not be present).

Moreover, the bill would preclude any future use of the polygraph, regardless of how limited such use might be, as a means of assessing civilian employees for access to highly sensitive information. This would prevent Defense, or any

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

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other agency of the government, from implementing the limited sort of program that Defense has had under consideration for the last two years. I am appending to my statement a very detailed explanation of the genesis and nature of that proposal, but with your indulgence, let me briefly describe for you its key features.

The primary change would be to permit a limited polygraph examination, comprised solely of questions to determine whether an individual is a spy for a hostile intelligence service, prior to giving him access to the most sensitive information held by the Department. Under this concept, heads of Defense components, with the approval of my office, could, if they saw fit, establish this sort of limited examination -- excluding any questions of a personal nature -- as a condition of access to information protected within so-called "special access programs", as authorized by Executive Order 12356. Under this proposal, however, no action could be taken on the basis of a person's reactions, as reflected on the polygraph charts, unless additional investigation produced derogatory information concerning the individual involved which in and of itself required action. Exceptions to this rule would have to be approved by the Secretary of Defense, or the Secretary of one of the military departments. Furthermore, refusals to take such examinations

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

could not be the basis for firing an employee. Any current employee who refused to take such an examination as a condition of obtaining special access would either remain in his job, or would be placed in a position of equal grade or pay within DoD.

In addition, the DoD proposal includes stringent safeguards to protect the rights of employees before, during and after the conduct of the examination. No question could be asked during an examination which had not been reviewed with the subject previously. Legal counsel could be available to the subject during the examination. Anyone who did not pass one examination would be entitled to a second examination by the same or a different examiner. The technical records of the examination may not be disseminated outside the office conducting the examination except as required by law. Other safeguards are detailed in the longer paper I am submitting.

In short, Madame Chairwoman, we have made every effort to devise a proposal for utilizing the polygraph that is limited in terms of those who may be subject to it; limited, in terms of the kinds of questions that may be asked; and limited, in terms of its effects on a particular individual. At the same time, we have provided as many safeguards for the entire process as we can devise to ensure our employees are treated fairly, and that their rights and privacy are protected.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

It is simply difficult for us to ignore, however, the demonstrated utility of the polygraph at CIA and NSA, where it has been successfully put to use for over ~~twenty~~ years. One also cannot ignore the fact that our adversaries' efforts to penetrate the defense and intelligence establishments continue unabated, and, regrettably, have often been successful, to the great detriment of the United States and her allies. The cases of Boyce and Lee; William Kampiles; William Holden Bell; Lt. Cook; CWO Joseph Helmich; and Geoffrey Prime are recent reminders of the relentless nature of the espionage threat, and indeed, the damage that can be inflicted by a single individual. We can spend billions of dollars on sophisticated military systems, communications systems or intelligence-gathering programs, only to have them rendered ineffective as a result of one person's treachery. We wonder, then, whether it is wise to foreclose, as the Brooks bill would do, one available means of coping with this insidious threat. Of course, the polygraph is not a perfect tool. But we believe it can be used to supplement other security measures in a manner which protects the rights of federal employees, while at the same time giving us indication of potential security problems in our most sensitive programs that we do not now have.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

It is noteworthy, in this regard, that the British Government, in the wake of the Prime case, is itself exploring a pilot project for the use of a limited polygraph program, similar to that contemplated in Defense as a protection against espionage. In her statement to the Parliament approving this effort, Prime Minister Thatcher explained:

> "The polygraph is the only measure of which it could be said with any confidence that it would have protected GCHQ (the British equivalent of NSA) from Prime's treachery, either because it would have deterred him from applying to join or would have exposed him in the course of examination. In view of this and the extreme gravity of the damage done by Prime, the Government accepts the Commission recommendation that a full and thorough pilot scheme be carried out. The Commission recognizes that a polygraph examination would be seen by some as an unwarranted invasion of their privacy, but we are dealing with matters of the highest national security, and those who have access to the nation's most sensitive secrets must expect to be subject to the most rigorous vetting procedures."

This, in essence, reflects our position as well. For this reason, we share the Administration's view that the Brooks bill should not be enacted. Defense and other federal agencies with highly sensitive responsibilities in the national security area should have the latitude

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

to utilize the polygraph under very controlled circumstances to prevent hostile penetrations.

Now, let me conclude with some brief remarks concerning pre-publication review. H.R. 4681 would have the effect of prohibiting the use of agreements with pre-publication review requirements in them, except at CIA and NSA, and would rescind any other such agreements which were already in effect.

In Defense, we did not implement the new non-disclosure agreement, containing the pre-publication review requirement, developed under NSDD-84. We did, however, in March of 1982, accede to the request of the Director of Central Intelligence to use the CIA's uniform non-disclosure agreement, containing a pre-publication review provision, within Defense as a condition of access to Sensitive Compartmented Information or SCI. Since March, 1982 and continuing currently, approximately 100,000 persons with SCI access in DoD excluding NSA have signed this form. Although it imposes a lifetime obligation to submit for review to the employing agency documents that a person may write for publication which in his judgment may contain SCI, relatively few have refused to sign the agreement.

Although it is early to assess the impact of this agreement, it does not to date appear to have had a significant impact. Leaving NSA aside (where such agreements have been commonplace

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

for many years), there have been only five documents submitted for review under the SCI agreement DoD-wide, and none of those involved former employees. To our knowledge, there have been no instances of non-compliance by former employees who have signed the agreement, although admittedly the agreements have been in force for only a short time.

If the Brooks bill were enacted, it obviously would have the effect of rescinding the old non-disclosure agreements that have been signed in DoD since March, 1982 -- all 100,000 of them; and it would preclude their use in the future in all DoD components, save NSA.

Whether former employees with SCI access should have a lasting contractual obligation to submit materials which may contain SCI for government review seems to us the issue. While there are few cases to demonstrate a significant problem -- that is, where former employees with SCI access actually write about sensitive intelligence sources and methods -- when these do occur, the existence of a non-disclosure agreement or contract does provide the Government with a remedy sanctioned by the Supreme Court in the Snepp case that it otherwise would not have -- a civil cause of action. Moreover, the review process in effect for some time at CIA and NSA has in fact succeeded in preventing a considerable amount of classified information from being disclosed to the public.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

We believe these benefits justify the establishment of the pre-publication review requirement, and the imposition of a lasting, albeit limited, obligation on former employees who had SCI access is a judgment that has been answered by this Adminstration in the affirmative. H.R. 4681 would obviously change that, and settle the issue for future Administrations as well.

I will be pleased to answer any questions you may have.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

CURRENTLY AUTHORIZED USES OF THE POLYGRAPH	PROPOSED DIRECTIVE/REGULATION
Investigation of crimes punishable by death, or confinement for one year or more.	No change.
Investigation of unauthorized disclosures of classified information.	No change.
Resolution of serious allegations which might affect security clearance that cannot be resolved through further investigation.	No change.
Military and civilian personnel assigned to the Central Intelligence Agency.	No change.
To test agents, sources or operatives in foreign intelligence or counterintelligence activities.	No change.
Civilian and contractor personnel for employment, assignment or detail to the National Security Agency (NSA). Military personnel* after assignment or detail, only in connection with highly compartmented duties.	All military personnel, upon assignment or detail to NSA, are subject to counterintelligence scope polygraph examination.
To assist in personnel security investigation of foreign nationals when background information cannot be otherwise verified.	Initial and aperiodic, counterintelligence scope, polygraph examination.
When requested by the subject of a criminal, counterintelligence or personnel security investigation for the purpose of exculpation.	No change.
COUNTERINTELLIGENCE POLYGRAPH EXAMINATION	
DoD policy does not currently provide for a separate, counterintelligence scope, polygraph examination.	Initial and aperiodic (random selection) examination of civilian, military and contractor personnel for access to specifically designated information within a special access program, approved by the Deputy Under Secretary of Defense for Policy (DUSD (P)). In exceptional cases, for interim access to Sensitive Compartmented Information, prior to completion of the background investigation. For employment in or assignment to critical intelligence positions in the Defense Intelligence Agency, designated by the Director, DIA.

* Since the 6 August 1982 Carlucci memorandum, all military personnel at NSA are subject to aperiodic (random selection), counterintelligence scope, polygraph examination. The Carlucci memorandum remains in effect at NSA because of congressional exemption.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

CURRENTLY AUTHORIZED USES OF THE POLY(OSED DIRECTIVE/REGULATION

ADVERSE ACTION* BASED ON POLYGRAPH EXAMINATION CHARTS

Action shall not be taken against an individual solely on the basis of the results of an analysis of polygraph charts.

When deception is indicated on polygraph charts, the examiner will attempt to resolve the matter with the examinee.

When the indicated deception is not resolved with the examinee at the time of initial polygraph examination, the results of the examination shall be forwarded to the requesting agency.

If, after review by the requesting agency, the individual's clearance is still in doubt, he will be given the opportunity for reexamination.

If, after further examination, the doubt remains, a comprehensive field investigation shall be undertaken to resolve the indicated deception.

If the investigation produces no actionable derogatory information, there will be no change in the individual's clearance status.

.. Exception to this provision must be personally approved by the Secretaries of the Military Departments; Director, National Security Agency; or in the case of other DoD Components, the Secretary or Deputy Secretary of Defense. The criteria for exception is limited to:

(1) access to highly sensitive information where time urgency does not permit completion of the investigation, or

(2) access to information of such extreme sensitivity that access under the circumstances poses an unacceptable risk to the national security.

ADVERSE ACTION BASED ON REFUSAL TO UNDERGO POLYGRAPH EXAMINATION

Adverse action shall not be taken against a person for refusal to take a polygraph examination.

Adverse action will not be taken on the basis of refusal in criminal or counterintelligence cases.

Special access program refusals may result in denial of access but shall not affect a person's grade or pay.

Applicants for DIA critical intelligence positions, CIA "staff-like" access, or any NSA duties, who refuse to take a polygraph examination shall be non-selected.

* Adverse action includes any of the following: denial or revocation of security clearance, denial or withdrawal of access to classified information, termination of employment, reduction in pay or grade, transfer or reassignment to a nonsensitive position, or nonselection or nonassignment to a sensitive position.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

CURRENTLY AUTHORIZED USES OF THE POLYGRAPH — PROPOSED DIRECTIVE/REGULATION

SAFEGUARDS TO PROTECT RIGHTS OF INDIVIDUALS

Timely notification of the date, time and place of the polygraph examination.	No change.
Advised of right to obtain and consult with legal counsel prior to the examination.	Expanded to clarify the right to have legal counsel available prior to, during, and after the polygraph examination. Right to terminate the polygraph examination at any time.
Advised of privilege against self-incrimination.	No change.
Probing of a person's thoughts or beliefs or conduct which have no relevance to the investigation are prohibited. (E.g., religion, racial matters, political beliefs and affiliations of a non-subversive nature.)	No change.
No relevant questions may be asked during the examination that have not been reviewed with the examinee prior to the examination.	No change.
DoD policy does not currently specify limitations on technical questions.	Technical questions necessary to the polygraph technique must be constructed to avoid embarassing, degrading or unnecessarily intrusive questions.
DoD policy does not currently limit relevant questions to counterintelligence topics.	Relevant questions asked during screening polygraph examinations must be limited to prescribed counterintelligence topics.
Adverse action may not be taken solely on the basis of polygraph charts.	No change.
Prior to the examination, examinee must be advised of the nature and characteristics of the polygraph instrument, including an explanation of the physical operation of the instrument and the procedures to be followed during the examination.	No change.
Examinee must be advised if the polygraph examination area contains a two-way mirror or other device, through which the examinee may be observed and if other devices such as those used in conversation monitoring or recording, will be used simultaneously with the polygraph.	No change.
A polygraph examination shall not be conducted if, in the opinion of the examiner, the examinee is mentally or physically fatigued, unduly emotionally upset, or rendered unfit to undergo an examination because of excessive use of a sedative, stimulants or tranquilizers.	No change.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6

CURRENTLY AUTHORIZED USES OF THE POLYGRAPH	DoD DIRECTIVE/REGULATION
Polygraph examination technical reports* shall be retained by the office conducting the polygraph examination and shall not be disseminated outside the Department of Defense except as required by law.	No change.
Polygraph examination results** may be made available to: .. Officials within DoD responsible for personnel security, intelligence, counterintelligence, law enforcement and the administration of justice. .. Law enforcement officials outside DoD when the examination has been conducted in connection with the investigation of a criminal offense or reveals criminal activity on the part of the individual examined. .. The examinee or his or her legal counsel, upon request. .. The National Archives and Records Service, General Services Administration upon retirement of the file.	No change.
Polygraph examinations shall be administered only by DoD polygraph examiners who have been selected, trained and certified in accordance with established DoD policies and procedures.	No change.
No specific provision contained in current directive for appeal of adverse actions in cases involving use of the polygraph.	Any adverse consequences in cases involving the polygraph are appealable in accordance with applicable personnel and security appeals procedures.

* Polygraph examination technical reports include pretest preparations, the examiner's notes, examination charts, and other technical details of the examination.

** Polygraph examination results include a synopsis of the examination, the relevant questions asked, the subject's answers, the examiner's opinion concerning truthfulness or deception, and any admissions made by the examinee during the examination.

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300390021-6